FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1989

FRASIEL L. HUGHEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Victim and Witness Protection Act permits an order of restitution in an amount greater than the loss to the victim caused by the conduct underlying the offense of conviction.

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OPINION BELOW

The opinion of the court of appeals (J.A. 86-110) is reported at 877 F.2d 1256.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1989. The petition for a writ of certiorari was filed on September 25, 1989, and granted on January 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

At the time of petitioner's October 1985 offense, the Victim and Witness Protection Act of 1982, 18 U.S.C. 3579, 3580 (1982), provided in part as follows: [1]

Section 3579. Order of restitution

(a) (1) The court, when sentencing a defendant convicted of an offense under this title * * * may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.[2]

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

* * * * *

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

* * * * *

[1] The full text of Sections 3579 and 3580 and other pertinent sections of the Victim and Witness Protection Act of 1982 in effect at the time of petitioner's offense are set forth in an appendix to this brief. Since the enactment of the restitution provisions on October 12, 1982—effective for offenses committed after January 1, 1983—numerous technical amendments have been made, including a renumbering of the provisions initially codified at 18 U.S.C. 3579, 3580, as 18 U.S.C. 3663, 3664, effective November 1, 1987. Pub. L. No. 97-291, § 5(a), 96 Stat. 1253, renumbered, Pub. L. No. 98-473, Tit. II, § 212(a)(1), 98 Stat. 1987. Like petitioner and the court below, we will refer to these sections as Sections 3579 and 3580.

[2] In his statement of the statutory provisions involved (Br. 2), petitioner includes a November 10, 1986 change in the statute, which substituted "such offense" for "the offense" as the last two words of Section 3579(a)(1). This change postdates petitioner's 1985 offense, but in any event the change does not affect the analysis in this case. See discussion, pp. 26-28, *infra*.

Section 3580. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, * * * and such other factors as the court deems appropriate.

* * * * *

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

STATEMENT

1. Petitioner Frasiel L. Hughey was employed by the United States Postal Service in San Antonio, Texas. Between June and December 1985, petitioner and two coconspirators, Clarence Eugene Thompson and Thomas Edward Beatty, Jr., perpetrated a scheme to steal, distribute, and misuse credit cards that had been returned to the San Antonio post office as undelivered mail. J.A. 54-55. In connection with that scheme, a second superseding indictment returned in the Western District of Texas charged petitioner with three counts of theft by a postal employee, in violation of 18 U.S.C. 1709 (1982), and with three counts of use of unauthorized credit cards, in violation of 18 U.S.C. 1029(a)(2) (Supp. II

1984).[3] J.A. 3-6. Petitioner pleaded guilty to the fourth count of that indictment, which charged (J.A. 4-5):[4]

> That on or about October 18, 1985, in the Western District of Texas, and elsewhere, Defendant, did knowingly and with intent to defraud use an unauthorized access device, to-wit: MBank Mastercard Credit Card Number 5417-1260-0013-9427, issued to Hershey Godfrey, 504 Cypress, Cosby, Texas 77532, and by such conduct did obtain things of value aggregating more than $1,000.00, such offense affecting interstate commerce, in violation of Title 18, United States Code, Section 1029(a)(2).

On April 6, 1987, petitioner was sentenced to eight years' imprisonment,[5] and ordered to pay restitution to MBank USA in the amount of $90,431, to be paid within five years after the end of the term of imprisonment. That restitution was assessed "jointly and severally with

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[3] Petitioner was originally charged by criminal complaint with one count of use of an unauthorized credit card, in violation of 18 U.S.C. 1029(a)(2) (Supp. II 1984), and one count of theft by a postal employee, in violation of 18 U.S.C. 1709 (1982). He was initially indicted on the same counts. A first superseding indictment added two more counts under Section 1029(a)(2) and one additional count under Section 1709. Gov't C.A. Br. 3; 1 R. 121-123, 172-173, 182-184.

[4] The count conformed with the elements of 18 U.S.C. 1029(a)(2) (Supp. II 1984), which provides as follows:

> (a) Whoever—
>
> * * * *
>
> (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period; * * * * *
>
> shall, if the offense affects interstate or foreign commerce, be punished as provided in subsection (c) of this section.

[5] The relevant sentencing provision of 18 U.S.C. 1029(c) (Supp. II 1984) provides for a fine of not more than $10,000 or twice the value obtained by the offense or imprisonment for not more than ten years, or both, for a first offense.

all other defendants related in this offense." J.A. 78.[6] The sentence was affirmed on appeal.

2. Petitioner's plea agreement (J.A. 7-8) did not mention restitution or any other aspect of sentencing. Petitioner agreed to plead guilty to one count of use of an unauthorized credit card; the government, for its part, agreed (a) to dismiss the remaining counts and previous indictments and complaint, and (b) not to prosecute petitioner "for any other offense arising in the Western District of Texas as part of the scheme alleged in the indictment." J.A. 7.

At his arraignment, petitioner was advised that "in addition to any term of imprisonment or fine imposed by the Court for the offense to which you are pleading guilty, you may be required to make restitution in the form of money for any property loss suffered by the victim as a result of this offense." J.A. 9. Admitting his guilt on the count to which he pleaded, petitioner specifically declined to acknowledge, respond, or admit to anything other than the facts pertaining to that count. J.A. 11.

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[6] Petitioner's co-conspirators, Thompson and Beatty, were separately charged. In a separate proceeding completed prior to petitioner's sentencing, co-conspirator Thompson pleaded guilty to one count of possession of stolen mail, in violation of 18 U.S.C. 1708 (1982), and was sentenced to five years' imprisonment and ordered to pay restitution to various financial institutions in the amount of $147,646.89, jointly and severally with restitution ordered against related defendants. Restitution to MBank USA was ordered in the amount of $144,887.22, restitution to Marine Midland Retail Credit was ordered in the amount of $1,420.70, and restitution to Government Employees Credit Union was ordered in the amount of $1,338.97. *United States* v. *Clarence Eugene Thompson*, No. SA-86-CR-163 (W.D. Tex. Dec. 8, 1986). In a separate proceeding completed after petitioner's sentencing, co-conspirator Beatty pleaded guilty to one count of use of an unauthorized credit card in violation of 18 U.S.C. 1029(a)(2) (Supp. II 1984), and was sentenced to eight years' imprisonment and ordered to pay $24,115.89 restitution. *United States* v. *Thomas Edward Beatty, Jr.*, No. SA-86-CR-84 (W.D. Tex. Sept. 4, 1987).

The government had evidence indicating that petitioner had stolen approximately 30 credit cards from the post office as part of his criminal scheme and that the losses to the issuing financial institutions from unauthorized use of those credit cards totalled $147,646.89;[7] as a result, this amount was initially proposed by the government as appropriate restitution. J.A. 12, 18, 21, 23. Petitioner thereupon filed a motion and memorandum interposing several objections. J.A. 12-20. He conceded restitution liability only for the single $1055.19 transaction that he understood to be the basis of the count to which he pleaded guilty. J.A. 13, 18. He argued that (1) the previously entered restitution order against his co-conspirator in the criminal scheme foreclosed a separate order of restitution against him; (2) his indigence rendered restitution inappropriate; (3) the scope of restitution sought by the government was unauthorized by the Victim and Witness Protection Act of 1982 (VWPA); (4) the government had failed to prove that he was responsible for the losses; and (5) compensation received by the issuing financial institutions from insurance or cardholder deductibles should be subtracted from any proposed restitution amount. J.A. 16-19.[8]

3. Prior to the sentencing hearing, the government decided to reduce its restitution request to encompass only losses sustained by MBank USA—the financial

[7] This amount involved petitioner's distribution or use of unauthorized credit cards issued by institutions other than MBank USA. See note 6, *supra*.

[8] Petitioner never argued, either before the district court or thereafter, that the government had breached the terms of his plea agreement, or that the agreement was invalid under Fed. R. Crim. P. 11 because, prior to acceptance of his plea, he was not properly informed, or was affirmatively misinformed, of his potential exposure for restitution. Rather, he consistently maintained that the restitution order was invalid for exceeding the amount authorized under the VWPA. See discussion at note 37, *infra*.

institution that issued the Godfrey credit card—as a result of petitioner's use of and trafficking in the stolen MBank credit cards. The court accepted into evidence a stipulation between the government and petitioner summarizing the testimony the government was prepared to offer to support the proposed restitution order. That stipulation identified 21 credit cards stolen by petitioner that were issued by MBank and listed the losses to MBank occasioned by the unauthorized use of each card—losses totalling $90,431. J.A. 53-57. Both in the stipulation itself and throughout the course of the sentencing proceeding, petitioner agreed that the stipulation, which was accepted in lieu of actual testimony, summarized the government's evidence bearing on his responsibility for the entire $90,431. However, he attacked the stipulated evidence as insufficient under the preponderance-of-evidence standard to demonstrate that his actions had given rise to that amount of loss J.A. 32-33, 71-72. Petitioner also stated that he was not admitting to any fact contained in the stipulation. J.A. 29, 57.

At the sentencing hearing, petitioner departed from his position that restitution liability extended only to the losses caused by a single credit card transaction. He suggested, as a compromise figure, that restitution be ordered for the total of $10,412 in losses to MBank caused by *all* misuses of the Godfrey credit card, thereby implicitly acknowledging his willingness to accept responsibility for these losses. J.A. 32, 47. In a subsequent written submission, petitioner recognized that his proposed restitution order of $10,412 extended "beyond the transaction of conviction," but defended it as lawful and appropriate under the circumstances. J.A. 68-69. After considering the stipulation, the parties' contentions, and information as to petitioner's financial status, the district court sentenced petitioner to pay MBank USA $90,431 within five years after the end of his eight-year term of imprisonment. J.A. 78.

4. Petitioner did not appeal from his conviction. Instead, he filed a motion under Fed. R. Crim. P. 35 to reduce and correct his sentence, arguing that the district court exceeded its authority under the VWPA in ordering restitution in any amount greater than the amount of loss caused by charges on the Godfrey credit card referred to in the sole count of the indictment to which he had pleaded guilty. J.A. 80-81. In denying that motion, J.A. 82-85, the district court ruled that it was authorized by the VWPA to order restitution "in excess of the amount indicated by the count to which the guilty plea was entered." J.A. 83. The court found that the stipulation of testimony was sufficient to show by a preponderance of the evidence that MBank suffered $90,431 in losses by virtue of petitioner's theft and distribution of various MBank credit cards. *Ibid.* The court also ruled that, to the extent its restitution authority might be limited to losses resulting from a single criminal scheme involving the count to which petitioner pleaded guilty, all losses encompassed by the restitution order were the result of such a scheme. J.A. 84.[9]

5. On appeal, the Court of Appeals for the Fifth Circuit affirmed. J.A. 86-110. The court interpreted the VWPA to permit restitution for losses caused by petitioner's entire course of trafficking and use of unauthorized MBank credit cards. It adopted the view that the VWPA permits a sentencing court to require restitution

[9] The court also rejected petitioner's argument that an order of restitution imposed on him was precluded by the prior order imposed on his co-conspirator Thompson. The court held that, although the VWPA (Section 3579(e)) foreclosed double recovery by MBank, it did not preclude "joint and several" restitution orders. J.A. 84. Finally, the district court rejected petitioner's argument that his indigence precluded the restitution order. The court stated that it had considered petitioner's financial situation as required by the VWPA (Section 3580(a)), but that petitioner's indigence at the time of sentencing did not preclude the order for restitution. J.A. 84-85.

beyond the count of conviction when a significant connection exists between the crime of conviction and similar acts causing losses to the victim. J.A. 97-100. The court found support for this holding in the text, legislative history, and purposes of the restitution provisions of the VWPA, as well as in decisions of other courts of appeals. The court observed that the meaning of the term "offense" in Section 3579(a)(1) of the VWPA, which authorizes courts to order restitution to any "victim of the offense," was "ambiguous." The court concluded that by directing courts, "in determining the amount of * * * restitution," to consider "such other factors as the court deems appropriate," 18 U.S.C. 3580 (a) (1982), Congress had "obviously give[n] a sentencing court some discretion in determining the proper restitutive amount." J.A. 93.[10] The court contrasted the VWPA's language with the more "limiting language" (J.A. 94) of the previously enacted Federal Probation Act (FPA), 18 U.S.C. 3651 (1982), which provided that a defendant, as a condition of probation, could be required to make restitution "to aggrieved parties for . . . loss *caused by the offense for which conviction was had.*" See J.A. 94 (quoting 18 U.S.C. 3651 (1982)). After reviewing the holdings of some courts of appeals that interpreted the FPA as limiting restitution to the amount attributable to the offense of conviction, the court stated (J.A. 95):

[10] The court also found support for the government's view in the language of Section 3580(e), which provides that a conviction of a defendant "for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense" in subsequent civil proceedings by the victim. The court reasoned that, "if Congress had intended to limit the amount of restitution to that attributable to the offense of conviction, subsection (e) would not have needed to employ the phrase 'for an offense involving the act giving rise to restitution' but instead could have simply stated 'for an offense giving rise to restitution.'" J.A. 94. The phrase "involving the act" was "useless surplusage" under petitioner's limited reading of the statute. *Ibid.*

> Congress must have been aware that such a limitation was placed on the FPA by some courts. Given the absence of any limiting language in the VWPA, it is reasonable to infer that Congress did not intend to limit victim compensation to the amount specified in the indictment.

The court also pointed to legislative history indicating that Congress designed the Act to ensure that wrongdoers "make their victims whole." See J.A. 95-96 (citing S. Rep. No. 532, 97th Cong., 2d Sess. 30 (1982)). Congress's generous compensatory purposes would be frustrated, the court asserted, by a rule that tied the amount of restitution to "a prosecutor's decision regarding the number of counts with which to charge a defendant," which is ordinarily controlled by factors having "little or nothing" to do with the objective of victim compensation. J.A. 96. In addition, the court observed that "given the high levels of plea bargaining within our criminal system," a rule limiting restitution under the VWPA to the count of conviction would mean that "in the majority of cases a victim could not be made whole." *Ibid.* In light of Congress's "stated intent of providing for the full restitution of victims," the court concluded, the statute should not be interpreted so as to be "rendered substantially nugatory through plea bargaining." J.A. 96-97.

The court of appeals disagreed with petitioner's contention that the district court had imposed "criminal responsibility" for all conduct that formed the basis of the restitution order, and had done so without making the necessary finding of proof beyond a reasonable doubt. J.A. 105-107. The restitution order was, rather, a penalty for the offense to which petitioner pleaded guilty: it did not constitute an independent assessment of petitioner's criminal liability for other offenses. The statutory standard of proof by a preponderance of the evidence (Section 3580(d)), which was appropriate to the determination of both the fact and amount of injury

underlying the restitution order, was met in this case. Finally, the court held that petitioner had been afforded all appropriate procedural steps leading to the restitution order and was not unfairly surprised as to the scope of restitution.[11]

SUMMARY OF ARGUMENT

1. The Victim and Witness Protection Act requires that an order of restitution be limited to losses suffered by a victim of the offense of conviction, but it does not limit the amount of the order to the losses caused by the specific conduct that is the basis of the offense of conviction.

a. None of the statutory language relied on by the petitioner imposes such a limitation. To the contrary, the Act clearly leaves room for the court, in fixing the penalty of restitution, to consider other losses suffered by the victim as a result of the defendant's conduct. Indeed, the statute as a whole evinces an inclusive, flexible approach to restitution orders that places a high priority on full and fair compensation to the victim for the harm done by the defendant. A strict "offense of conviction" standard would seriously undermine this approach, especially in the context of a system, like ours, in which plea bargaining plays an important role in the administration of criminal justice.

b. The existence of judicial discretion to look beyond the offense of conviction in ordering restitution is supported not only by the text of the VWPA but by two important aspects of the background against which the statute was enacted. First, such discretion is fully consistent with the common law understanding of restitution as a penal sanction and with the traditional scope

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[11] The court of appeals also rejected petitioner's argument that the sentencing court had not properly assessed his indigence and had not given adequate consideration to petitioner's proposed "compromise" figure. J.A. 107-110.

of penal restitution orders. Second, discretion in shaping the scope of restitution is simply an instance of the customary authority of sentencing judges to look to facts outside the particular offense of conviction in fixing the terms of a sentence.

c. In determining whether a particular order of restitution represents a permissible exercise of the trial court's sentencing discretion, the lower courts have properly looked to a number of factors that bear on both fairness to the victim and the penological purposes of restitution. In the present case, given the close relation between the offense of conviction and the other conduct that furnished a basis for the order, as well as the existence of a common victim and a common scheme, the restitution order did not constitute an abuse of the district court's discretion.

2. Nor did the restitution order violate any of petitioner's constitutional rights. Since the restitution authorized by the VWPA is in the nature of a criminal penalty, the Seventh Amendment guarantee of jury trials in civil cases has no application. And since the restitution order is an aspect of the sentence imposed for the crime of which petitioner was convicted, and not a separate criminal proceeding, the Sixth Amendment guarantee of jury trial is similarly inapplicable. Moreover, the procedural protections provided in the Federal Rules of Criminal Procedure, and in the VWPA itself, are more than adequate to satisfy the demands of due process.

ARGUMENT

I. THE VICTIM AND WITNESS PROTECTION ACT AUTHORIZES AN ORDER OF RESTITUTION IN AN AMOUNT IN EXCESS OF THE LOSS TO THE VICTIM CAUSED BY THE OFFENSE OF CONVICTION

The question in this case is whether the VWPA permits judges to sentence an offender to pay restitution to a victim of the offense in excess of the amount attributable to the acts underlying the count on which he is convicted—which we refer to as the "offense of conviction." In our view, the court of appeals was correct in concluding that such a sentence may lawfully be imposed. An order of restitution under the VWPA unquestionably is a criminal penalty. See pp. 42-43, *infra*. The text and history of the VWPA, buttressed by the background understanding of the nature and scope of restitution authority, strongly support restitution orders that extend beyond the offense of conviction, and that advance accepted penological objectives and the goal of fair compensation of victims.

No aspect of the VWPA imposes a limitation on the scope of permissible penal restitution that would call into question the validity of the restitution order in this case. Section 3579(a)(1) provides that "when sentencing a defendant convicted of an offense," the court may order "that the defendant make restitution to any victim of the offense." As petitioner acknowledges, the language of that Section "unambiguously answers two questions." Pet. Br. 14. First, the term "offense," as used in that section, means the offense for which the defendant is convicted and is being sentenced—in this case, the offense of a single unauthorized use of a credit card issued by MBank. In authorizing an order of restitution when a court sentences a defendant "convicted of an offense," Section 3579(a)(1) indicates that the term "offense" refers to the actual offense for which the defendant was convicted. Second, the meaning of the

term "offense" as used in the phrase "convicted of an offense," is the same as its meaning in the phrase "victim of the offense" in the same section. Therefore, "victim of the offense" identifies one who suffers a loss from the conduct underlying defendant's conviction, and Section 3579(a)(1) authorizes an order of restitution only to such a victim. In this case, MBank is unquestionably a victim of the "offense of conviction"—the single use of the Godfrey credit card "on or about October 18," to which petitioner pleaded guilty in the fourth count of the indictment.[12] But identifying MBank as a "victim of the offense" no more defines the extent of permissible restitution than does identifying petitioner as the "defendant" who may be ordered to pay.

Petitioner goes to extraordinary lengths (Br. 13-19) to persuade the Court that the word "offense" in Section 3579(a) refers to the offense of conviction for which he was sentenced. We are in complete agreement: in this case, the term "offense" in Section 3579(a) refers solely to the violation of 18 U.S.C. 1029(a)(2) (Supp. II 1984) which was charged in the fourth count of the indictment and of which petitioner was convicted. We part company with petitioner, however, in his endeavor to show that a limited meaning of the word "offense" restricts the extent of restitution to the losses directly caused by the offense of conviction.

Indeed, petitioner acknowledges (Br. 15) that the language of Section 3579(a)(1) does not resolve the question of *how much* restitution a defendant may be ordered

[12] We agree with petitioner, see Pet. Br. 15 n.4, that this case does not present the related question of who may qualify as a proper victim of the "offense of conviction," since MBank was unquestionably the victim of the offense to which petitioner pleaded guilty, and MBank suffered the entire loss represented by the total amount of restitution ordered by the judge.

Nor does this case present the question of defining the victim or victims of the offense where a defendant is convicted (by plea or otherwise) of a count charging a conspiracy or scheme encompassing a course of conduct.

to pay to a victim of the offense of conviction. Section 3579(a)(1) supplies a principle of identification, but sets no further limit on an award: it is silent concerning a method for calculating the amount, the factors that might bear on the magnitude of the penalty, or the judge's discretion to consider conduct or circumstances beyond the strict limits of the statutory offense.

Contrary to petitioner's contentions (Br. 15-17), Sections 3580(a) and (d) similarly do not limit the amount of restitution to the loss to the victim occasioned solely by the offense of conviction. As we shall show, these provisions clearly leave room for the court, in fixing the penalty of restitution, to consider other losses suffered by the victim as a result of the defendant's conduct. Such discretion is consistent with other sections of the statute, which unequivocally express Congress's intent to provide victims with full and fair compensation for all losses caused by a defendant's conduct. The language of various sections of the VWPA evince Congress's desire to remove artificial limitations on restitution by permitting sentencing judges to exercise their customary discretion to consider the totality of circumstances—including the defendant's *entire* course of conduct—subject only to constitutional limits and the demands of judicial efficiency. An examination of the nature and underlying penological objectives of restitution as a criminal penalty, and of the state law understanding of restitution, strengthens the conclusion that the VWPA permits courts to order restitution for losses to the victim that were caused by conduct outside the specific offense of conviction.

A. The Language and Structure of the VWPA Do Not Limit Restitution to Losses Flowing From Conduct Underlying the Offense of Conviction

1. Apart from Section 3579(a)(1), which authorizes the court to order restitution to "any victim of the offense," the Act contains several other sections that bear on the question of *how much* restitution may be ordered in a particular case. None of these provisions limits the

restitution order to the losses flowing from the offense of conviction. On the contrary, the language of the provisions dealing with restitution, taken as a whole, supports the existence of a broad authority to order restitution beyond the particular count of conviction.

Petitioner claims to find the "unambiguous answer" to the question "how much" in Sections 3580(a) and (d) of the statute. But these provisions place no fixed limit on the scope of an order of restitution. Section 3580(a) states:

> The court, in determining * * * the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense.

And Section 3580(d) states that disputes as to the "amount or type of restitution" shall be resolved by a preponderance of the evidence, and that the government shall bear the burden of "demonstrating the amount of the loss sustained by the victim as a result of the offense." As petitioner points out (Br. 16), the loss "resulting from the offense"—that is, from the actual offense of conviction—is only one element of the restitution calculus. Section 3580(a) also directs the court to take into account "such other factors as the court deems appropriate." 18 U.S.C. 3580(a). And similarly, Section 3580(d) provides that the "burden of demonstrating such other matters as the court deems appropriate"—that is, matters other than the loss resulting from the offense itself—"shall be upon the party designated by the court as justice requires."

Thus, in authorizing restitution orders under the VWPA, Congress made provision for judicial consideration of "other factors" and "other matters." Congress nowhere precluded consideration of the defendant's conduct surrounding the offense of conviction as an additional factor that might make a larger restitution order appropriate.[13]

[13] While Section 3580(a) allows the court to consider all "appropriate" factors in shaping an order, a number of provisions of Section 3579 do operate to define the scope of the court's discretion. As already noted, Section 3579(a) limits restitution orders to the victim of the offense of conviction. Section 3579(b) specifies the kinds of loss for which the order can compensate in the case of damage to property or personal injury. (The language of this subsection, which refers to an "offense resulting in" property damage or personal injury, cannot be read to limit all restitutionary authority to the offense of conviction, since the clear purpose of the subsection is, as indicated, to spell out the kinds of harms that can be the subject of a restitution order, *e.g.*, costs of professional services, loss of income, value of property, etc. See S. Rep. No. 532, 97th Cong., 2d Sess. 31-32 (1982).) In addition, the formulation of a restitution order may not unduly complicate or prolong the sentencing process (Section 3579(d)); the victim may not receive double recovery on account of restitution (Section 3579(e)); and the order may not impose a payment obligation beyond a specified period of time (Section 3579(f)).

2. Expressions of congressional preference for flexibility and generosity in providing for restitution are found throughout the statute.[14]

a. As is evident from the statement of findings and purposes of the VWPA (see 18 U.S.C. 1512 note, § 2(a) and (b) (1982) (App., *infra*, 5a-6a)), Congress sought through the VWPA to ameliorate the unresponsiveness of the criminal justice system to the interests and needs of the victim. Congress declared that "the Federal Government * * * has an important leadership role to assume in ensuring that victims of crime * * * are given proper treatment by agencies administering the criminal justice system." VWPA Section 2(a)(3). Through the VWPA, Congress sought "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims * * * of crime without infringing on the constitutional rights of the de-

[14] In support of his reading of the statute, petitioner seeks refuge in the rule of lenity. Br. 23-24. See, *e.g.*, *Crandon* v. *United States*, No. 88-931 (Feb. 27, 1990), slip op. 15. As petitioner recognizes (Br. 24), however, that canon of statutory construction is not applicable where, as here, the statute expressly or by implication makes the intent of Congress sufficiently clear. See *United States* v. *Turkette*, 452 U.S. 576, 587-588 n.10 (1981).

fendant." VWPA Section 2(b)(2). There is no substantial argument that petitioner's constitutional rights would be impaired by a common sense interpretation giving all provisions of Section 3580(a) and (d) their full effect. The existence of discretion to look beyond the offense of conviction in ordering restitution under appropriate circumstances—and with appropriate procedural safeguards—comports with well-established sentencing practice, and presents no constitutional difficulties. See pp. 36-38 and 41-46, *infra*.

b. Yet another provision of the VWPA expresses Congress's expectation that a broad range of information would be considered by the sentencing court in determining the type and amount of restitution. Section 3 of the statute enacted new provisions of Fed. R. Crim. P. 32(c)(2)(C) and (D), which enumerated information to be included in the presentence report. The report was to contain "(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and (D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense." The evident purpose of this requirement for the sentencing court was to permit the formulation of an appropriate order of restitution. The sweeping language of the rule is notable for the absence of any indication that information to be gathered should pertain only to losses resulting from the offense of conviction.[15] The rule focuses on the victim's "restitution

[15] As part of its substantial revision of federal sentencing procedures in the Sentencing Reform Act of 1984, Congress replaced the VWPA provisions of Rule 32(c)(2)(C) and (D) with new provisions (D) and (F), which now require the presentence report to contain "verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed" and "such other information as may be required by the court." Act of Oct. 12, 1984, Pub. L. No. 98-473, § 215(a), 93 Stat. 2014. There is no indication that any substantive change was intended by this modification.

needs" and the multiple types of harms actually suffered by a "victim of the offense." It does not restrict the source of that harm, and is devoid of any directive to disregard the realities of the defendant's actual conduct toward the victim.

c. The inclusive and flexible approach to victim welfare that finds expression in the contemporaneously enacted provisions governing the presentence report is also evident in Section 3579(d) of the VWPA itself, which stated that the court "shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process."[16] Thus, Section 3579(d) required the court, in fashioning a restitution order, to give priority to "fair[ness] * * * to the victim,"[17] subject only to the interest

[16] Effective December 10, 1986, Section 3579(d) was modified to provide as follows:

> To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 77(a), 100 Stat. 3618; see 18 U.S.C. 3579(d) (Supp. IV 1986). The balance required by this version of the provision is not significantly different from that required by the initially enacted version of the VWPA.

[17] The statement of findings and purposes enacted in Section 2 of the VWPA sheds additional light on one aspect of what Congress meant by "fair[ness] * * * to the victim." Congress found that "victims * * * are either ignored by the criminal justice system or simply used as tools to identify and punish offenders. * * * All too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system unresponsive to the real needs of such victim." VWPA Section 2(a)(1) and (2).

in forestalling undue complication or prolongation of the sentencing process. Together with Section 2(b) of the statement of findings and purposes, discussed above, this provision establishes that the maximization of compensation for the victim's losses shall be limited only by the defendant's rights under the Constitution and the need to avoid undue cost and delay.[18]

d. A strict "offense of conviction" limitation on orders of restitution cannot be reconciled with the statutory objective of fairness to victims. Such a narrow reading would routinely result in victim undercompensation because the scope of the authority to order restitution would depend on prosecutorial decisions that are not based on the victim's interests or on the actual damage to the victim caused by conduct of the defendant. The observations of the Tenth Circuit in *United States* v. *Hill*, 798 F.2d 402, 405 (1986), are particularly illuminating. In deciding that limiting a victim's recovery under the VWPA to the amount charged in the count of

[18] The legislative history of the VWPA is fully consistent with the textual evidence that the Act provides a broad scope to the courts' authority to order restitution. Thus, in describing the compromise provision governing restitution, the section-by-section analysis declared: "The goal of the legislation is to ensure that Federal crime victims receive the fullest possible restitution from criminal wrongdoers." 128 Cong. Rec. 27,391 (1982). See also 128 Cong. Rec. 26,811 (1982) (statement of Sen. Laxalt commenting on the compromise bill) ("The purpose of this bill is to attempt to make the victim whole once again."). Similar statements of purpose were made in reference to both S. 2420, 97th Cong., 2d Sess. (1982) and H.R. 7191, 97th Cong., 2d Sess. (1982)—the proposed Senate and House versions—before the compromise version developed. See S. Rep. No. 532, 97th Cong., 2d Sess. 30 (1982) ("The premise of the [restitution] section is that the court in devising just sanctions for adjudicated offenders[] should insure that the wrongdoer make goods [*sic*], to the degree possible, the harm he has caused his victim."); 128 Cong. Rec. 26,348 (1982) (statement of Rep. Rodino) ("One of the purposes of the Federal criminal justice system should be to make the victim financially whole. The person who should be responsible for doing this is the wrongdoer, the person who caused the loss. For this reason alone, the courts should order restitution whenever possible.").

conviction was "unwarranted given the compensatory objectives of the VWPA," the court observed:

> The decision of a prosecutor to indict a defendant and the manner in which a defendant is indicted have little, if anything, to do with objectives of the VWPA. For instance, a prosecutor's decision to charge a defendant for one or more counts of an offense is discretionary, and that discretion is exercised by taking into consideration law enforcement objectives which have nothing to do with the congressional objective of compensating crime victims. The decision to specify an amount in the indictment is also often solely for the purpose of satisfying jurisdictional requirements.

The exigencies of the criminal justice system, rather than careful regard for the well-being of victims, tend to drive such prosecutorial decisions as how to charge an offender or structure an indictment. Prosecutors may specify only a fraction of the conduct that could form the basis of criminal charges in order to accommodate the technical definitions of criminal code offenses, ensure the fulfillment of jurisdictional requirements for criminal liability, minimize the difficulty of proving a charge, or avoid distracting juries with too many facts or multiple counts.

This case illustrates some of these principles. The six counts of the second superseding indictment were based on only a portion of the unlawful conduct—even though the government possessed substantial evidence that petitioner's misfeasance was far more extensive. Compare J.A. 3-6 (second superseding indictment) with J.A. 53-57 (stipulation of testimony for sentencing). And the fourth count of the indictment, which charged only one among several unauthorized uses of the Godfrey credit card, was clearly structured to ensure technical compliance with the elements of 18 U.S.C. 1029(a)(2) (Supp. II 1984) (which requires a gain from the transaction(s) of $1,000 or more), and to simplify the task of proof. In attending to these priorities, however, the

interests of MBank in receiving full compensation for petitioner's credit card fraud were inevitably slighted.

In cases such as this, where the defendant engaged in an overall scheme involving small, individual acts of criminal fraud, the sacrifices of victims' interests that would result from petitioner's crabbed construction of the VWPA is manifest. To insure full restitution even to a single victim, the government would often be required to charge many counts, and to prove each beyond a reasonable doubt. Congress could not have intended to condition full and fair restitution on such drastic changes in prosecutorial practice.

In addition, as the Second Circuit stated in *United States* v. *Berrios*, 869 F.2d 25, 30 (1989), "the fact that the vast majority of criminal cases are concluded by plea bargains" further intensifies "[t]he apparent conflict between Congress's expressed intent [in the VWPA] that crime victims be compensated to the maximum extent possible and the proposition that the charge on which the defendant is convicted establishes the maximum restitution that may be ordered." Plea bargaining is "an essential component of the administration of justice," *Santobello* v. *New York*, 404 U.S. 257, 260 (1971), and accounts for the overwhelming majority of criminal convictions. See *United States* v. *Berrios*, 869 F.2d at 30 (citing Fed. R. Crim. P. 11 advisory committee note (1974 Amendment) (1968 study estimating that guilty pleas "account for the disposition of as many as 95% of all criminal cases")).

A restrictive view of a court's authority to order restitution would have two untenable consequences for a system in which plea bargaining is the principal method for dealing with criminal conduct. First, the prosecutor would be put to a hard choice—one clearly not intended by the VWPA—of going to trial on a larger number of counts or sacrificing the interests of victims. Second, petitioner's rule would shrink any incentive the defendant might have to plead guilty to a particular charge, since it would eliminate the defendant's hope of persuading the

judge to reduce the term of incarceration on that charge by promising to make broad restitution for the "real offense." Cf. *United States* v. *Hawthorne*, 806 F.2d 493, 499-500 (3d Cir. 1986) (noting that the degree to which restitution was available likely influenced the district court to give a lighter sentence); *United States* v. *Berrios*, 869 F.2d at 33 (same); *United States* v. *Spambanato*, 876 F.2d 5, 7 (2d Cir. 1989) ("as in *Berrios*, the expressed willingness to make full restitution clearly was intended to influence and did in fact influence the court to be more lenient in sentencing"). In structuring the terms of plea bargains, prosecutors would have less scope to exercise their judgment that victim restitution (as opposed to a prison term) would best serve society's interests.

3. The danger that an "offense of conviction" limitation would undermine the goal of full and fair victim compensation is starkly revealed by the attempts of the courts of appeals, under the Federal Probation Act (FPA), to avoid the unpalatable consequences of the limitation in a system dominated by plea bargaining. Since 1925, the federal courts have had authority to impose restitution as a condition of probation. See Act of Mar. 4, 1925, ch. 521, § 1, 43 Stat. 1259.[19] The FPA, in sharp contrast to the VWPA, provided that a court could order the defendant "to make restitution or reparation to aggrieved parties for actual damages or loss *caused by the offense for which conviction*

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[19] The Federal Probation Act (Act of June 25, 1948, ch. 645, 62 Stat. 842, as amended and codified at 18 U.S.C. 3651 (1982)), provided the statutory authority for such orders of restitution until its repeal, effective for offenses committed after November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 212(a)(1) and (2), 235, 98 Stat. 1987, 2031, as amended by the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, 4, 99 Stat. 1728. Whether or not the FPA was wholly superseded by the VWPA prior to 1987, the present case is not governed by the FPA because petitioner was not ordered to make restitution as a condition of probation.

was had." 18 U.S.C. 3651 (1982) (emphasis added). Although the courts of appeals were in general agreement that a restriction on the extent of restitution flowed from that particular statutory language, the cases were split on the extent and nature of that limitation. One line of cases maintained that the FPA limited the scope of restitution to the conduct inherent in the offense of conviction. See, *e.g.*, *Karrell* v. *United States*, 181 F.2d 981 (9th Cir.), cert. denied, 340 U.S. 891 (1950); *United States* v. *Johnson*, 700 F.2d 699, 701 (11th Cir. 1983). However, without pointing to a clear statutory basis, another line of decisions recognized an exception, commonly arising in the plea bargain situation, in which the defendant agreed to make restitution for the greater amount as a condition of his plea, or admitted at some point in the proceedings that he was responsible for losses caused by conduct outside the offense of conviction. See, *e.g.*, *United States* v. *Orr*, 691 F.2d 431 (9th Cir. 1982); *United States* v. *McMichael*, 699 F.2d 193 (4th Cir. 1983).[20] See also Slavin & Sorin, *Congress Opens a Pandora's Box—Restitution Provisions of the Victim and Witness Protection Act of*

[20] Yet another line of cases construed the FPA as imposing a limitation only on the independent fact-finding authority of the sentencing court. Unlike the VWPA, the FPA did not explicitly provide for judicial determination of harm to the victim and did not contain provisions allocating the burden of proof or setting the standard of proof of losses resulting from the defendant's actions. Cf. 18 U.S.C. 3580(d). In addition, not until 1983 was Fed. R. Civ. P. 32(c) amended to require the collection of information relating to harm to the victim as part of the presentence report.

In the absence of fact-finding authorization under the FPA, these courts held that the sentencing judge was precluded from determining the total losses caused by defendant's conduct as an aspect of the sentencing hearing; but if such losses had been established at trial, by plea, or in some other forum, then a restitution order under the FPA could extend to conduct beyond the offense of conviction. See, *e.g.*, *United States* v. *Gering*, 716 F.2d 615, 625 (9th Cir. 1983); *United States* v. *Landay*, 513 F.2d 306 (5th Cir. 1975).

1982, 52 Fordham L. Rev. 507, 512 (1984) (reviewing "judicially-created exceptions to the restrictive approach" under the FPA). By creating an exception for admissions" or fully bargained pleas, these courts avoided circumscribing judicial authority to order restitution in cases where procedural difficulties of fact-finding and proof were minimized by the defendant's admission (see note 20, *supra*), and the unfairness and inflexibility of the "offense of conviction" rule were thus most apparent.

Because the more permissive language of the VWPA has generally been construed to permit restitutionary orders that account for losses beyond the offense of conviction, as yet the courts of appeals have had no occasion to determine the issue whether such an exception exists under the Act.[21] In this very case petitioner, at his sentencing hearing, indicated a willingness to accept responsibility for losses beyond those caused by the offense of conviction; thus, if the courts below had adopted an offense of conviction standard, they might have had to confront that issue.

In our view, the VWPA no more supports an "admissions exception" than it does an "offense of conviction" standard to which such an exception would apply. Rather, the statute grants discretionary authority applicable in *all* cases where responsibility for the victim's losses is established—whether through the defendant's own admission, or through judicial factfinding.[22] By

[21] See cases cited at pp. 39-40, *infra*; but see *United States* v. *Berrios*, 869 F.2d at 32 (noting defendant's expressed willingness to make full restitution); *United States* v. *Spambanato*, 876 F.2d at 7 (same); *United States* v. *Paul*, 783 F.2d 84, 88 (7th Cir. 1986) (restitution proper as to amount of loss defendant "admitted to having caused"). See also *United States* v. *Kirkland*, 853 F.2d 1243, 1251 (5th Cir. 1988) (implying that agreement to make restitution beyond counts of conviction was part of "detailed plea negotiations").

[22] As suggested below, however, pp. 39-41, a court in the exercise of its discretion to consider "appropriate factors," might take the existence of the defendant's admission into account as bearing on both the fairness to the victim and the penological value of an

creating an elaborate factfinding procedure and prescribing a standard of proof of injury, Congress has decided that the only necessary predicate for a full order of restitution—where such restitution would be "appropriate"—is a finding by a preponderance of the evidence that the loss sustained by the victim was the result of a defendant's actions. It is not for the judiciary to strike a different balance by reading the VWPA to permit a broader restitution order *only* when the basis for such an order is supplied by the defendant's own admission or agreement.[23]

4. In 1986, as part of the Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 79(a), 100 Stat. 3619, Congress changed the term "victim of the offense" in Section 3579(a) to read "victim of such offense." As we have noted, see note 2, *supra*, the substantive sentencing provision in effect on the date of petitioner's October 1985 offense governs this

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order of restitution that encompasses losses to the victim from the admitted conduct.

[23] Plea bargains have a dual character. Cf. *Santobello* v. *New York*, 404 U.S. at 261-262. To the extent they are contractual agreements between the prosecutor and the accused, the limitations on a judge's sentencing authority to order restitution would not limit the restitution obligation that the defendant might be willing to undertake in exchange for the government's agreement not to prosecute on certain charges. If the defendant breaches his restitution agreement, the prosecutor may be at liberty to reinitiate prosecution. But to the extent a sentencing court seeks to impose a lawful, enforceable sentence that incorporates a restitution requirement, and thereby subjects the defendant to possible revision of the sentence for a violation of the restitution order, the authority to impose such a sentence must be premised on Congress's grant of authority, not on the prosecutor's and the defendant's mutual acquiescence. See *United States* v. *Missouri Valley Construction Co.*, 741 F.2d 1542 (8th Cir. 1984) (en banc) (A court has no authority under the FPA to impose on a willing corporation as a condition of probation, in lieu of a fine, the requirement that it contribute money to a charitable organization that has not suffered actual damages or loss from corporation's criminal conduct.).

case. Hence, petitioner is wrong to assume that the version of Section 3579(a) that applies here includes the phrase, "any victim of such offense." See *Miller* v. *Florida*, 482 U.S. 423, 429 (1987); *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). But, in any event, petitioner is plainly wrong in arguing (Br. 21-25) that this change restricted the scope of restitution available under the VWPA, or that it somehow demonstrated that the 1982 version of the VWPA was itself intended to be restrictive. As the committee report explained, this change was "unnecessary because it will not alter the meaning of the provision." H.R. Rep. No. 334, 99th Cong., 1st Sess. 7 (1985).[24] The committee report included the following explanation of what is referred to by the phrase "victim of the offense" in the 1982 version of Section 3579(a):

> The term "the offense" in the phrase "victim of the offense," by the ordinary rules of sentence construction, refers to the term "offense" in the antecedent phrase in the same sentence, "convicted of an offense." That term means a victim of the offense for which the defendant has been convicted and is being sentenced.

H.R. Rep. No. 334, *supra*, at 7 (footnote omitted).[25] We subscribe to this analysis of the meaning of the

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[24] This report accompanied H.R. 2713, 99th Cong., 1st Sess. (1985), which is identified at 132 Cong. Rec. H11,295 (daily ed. Oct. 17, 1986) as the source of the change from "the offense" to "such offense."

[25] The omitted footnote to the quoted passage of H.R. Rep. No. 334, *supra*, see Pet. Br. App. A20 n.26, refers to H.R. Rep. No. 1017, 98th Cong., 2d Sess. 83 n.43 (1984), a report that accompanied the proposed Sentencing Revision Act of 1984, H.R. 6012, 98th Cong., 2d Sess. (1984), which was never enacted. See also Pet. Br. 24 n.14 (citing H.R. Rep. No. 1017, *supra*). In the course of discussing the restitution provisions of the VWPA, H.R. Rep. No. 1017 makes several assertions that purport to answer the question whether the VWPA confers authority on the court to "order the defendant to make restitution to victims of the offenses alleged

phrase, "victim of the offense" in Section 3579 as enacted. As we have pointed out, the phrase merely identifies who may receive restitution, just as the phrase "the defendant" merely identifies who may be ordered to pay it. The scope of the crucial term, "order of restitution," is in no way affected by the conclusion that the term "offense" refers to the offense on which sentence is being imposed, *i.e.*, the offense of conviction.[26]

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in the dismissed counts" of an indictment resolved by plea agreement. H.R. Rep. No. 1017 at 83 n.43, *supra*, maintains that an order of restitution under the VWPA cannot extend to losses caused by defendant's conduct outside the offense of conviction.

This statement, which appears in a committee report of a never-enacted bill, has little if any bearing on the meaning of the change from "the offense" to "such offense" that was part of a later enactment, or on any of the issues in this case. First, the fact that H.R. Rep. No. 1017 purports to establish post-enactment legislative history for the VWPA significantly attenuates its value as an exposition of the intent behind that statute. Second, the Report offers no coherent basis in the language of the statute for such a construction. Rather, the Report relies on the "victim of the offense" language in Section 3579(a), which transparently fails to support a limitation on the *amount* of restitution, without explaining *how* the language operates to limit the amount not simply to the losses suffered by the victim but to the losses resulting from the offense of conviction. (Indeed, the Report may have been focusing on the question whether restitution can be ordered to the victims of other offenses and not on the question of restitution to the victim of the offense of conviction.) Also, the Report states that such an interpretation "would deprive the defendant of property without due process of law." As we show in the text, *infra*, such a constitutional argument is without merit. Finally, the reference to H.R. Rep. No. 1017 in the section of H.R. Rep. No. 334 explicating the change from "the offense" to "such offense," see Pet. Br. App. A20 n. 26, is in the form of a cryptic "but see" citation without explanation.

[26] The legislative materials accompanying the VWPA indicate that the restitution provisions of the bill were modeled on two progenitors, one of which was H.R. 6915, 96th Cong., 2d Sess. (1980), which contained restitution provisions as one small part of the monumental proposal in 1980 to revise the federal criminal code.

B. Judicial Authority Under the VWPA To Look Beyond the Particular Count of Conviction in Fixing Restitution Is Consistent With the Nature of Restitution as a Penal Sanction and With the Courts' Customary Flexibility To Fix the Terms of a Sentence

As we have argued, the language of the VWPA fully supports the sentencing court's discretion, in ordering restitution, to take into account conduct other than that

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See 128 Cong. Rec. H8202 (daily ed. Sept. 30, 1982) (remarks of Rep. Rodino).

Statements in the House Report accompanying that proposed legislation indicated that the drafters intended to adopt an "offense of conviction" limitation on the amount of restitution: "Restitution may only be imposed with respect to damages established by the conviction. Restitution cannot be imposed for damages caused by conduct in charges that are dismissed." H.R. Rep. No. 1396, 96th Cong., 2d Sess. 457 (1980).

This legislative history is of little value in discerning Congress's intent with respect to the VWPA. First, although drafters of the House version of the VWPA acknowledged that the language of H.R. 7191 (which became the VWPA) was drawn in part from the 1980 bill, H.R. 6915 (see 128 Cong. Rec. H8202 (daily ed. Sept. 30, 1982) (remarks of Rep. Rodino)), Congress never explicitly adopted the legislative history of H.R. 6915, nor did it ever refer to or reiterate the above-quoted passage of the committee report accompanying the proposed 1980 bill. The one reference to the 1980 House Report on the predecessor bill in the legislative history of the VWPA (see 128 Cong. Rec. 26,352 (1982), which is part of the section-by-section analysis of H.R. 7191) is to a passage explicating provisions not at issue here.

Also, the VWPA added provisions that did not appear in the earlier versions, including those we have identified as central to the breadth of the statute: the declaration of findings and purposes directing a broad construction of the courts' authority to order restitution, subject only to constitutional limitation; the directive that the court "shall impose an order of restitution to the extent that such order is as fair as possible to the victim . . ."; and the authority for the sentencing court to determine by a preponderance of the evidence "[a]ny dispute as to the proper amount or type of restitution." These differences between the statute proposed in 1980 and the VWPA reflect a considerable expansion of the concept and scope of victim restitution.

underlying the offense of conviction. There are, in addition, other important considerations buttressing the existence of such discretion. First, Congress legislated against a familiar common law background relating both to the nature of restitution as a penal sanction and to the permissible scope of penal restitution orders. Second, the statute should be understood in the context of the customary discretion accorded sentencing judges to look to factors beyond the elements of the statutory offense in fixing the terms of a sentence.

1. One possible source of limitation on judicial authority to fix the amount of restitution under the VWPA is that the order must qualify as an "order of restitution." Since the VWPA does not provide a definition of that term, it should be interpreted as having its contemporary, ordinary meaning. See *John Doe Agency* v. *John Doe Corp.*, 110 S. Ct. 471, 476 (1989). As we will show, the contemporary and ordinary meaning of an order of restitution, when it is employed as a penal sanction, does not inherently limit its scope to the losses caused by the offense of conviction. Rather, the restitution order need only be reasonable, fundamentally fair, and justified by legitimate penological objectives.

a. "Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history." Note, *Victim Restitution and the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 933 (1984). Although declining in importance following the separation of civil and criminal law in Western legal systems, restitution never passed entirely out of use as a criminal sanction. Restitution was a common sanction in colonial times (see *id.* at 934), and prior to enactment of the VWPA, it had long been available as a criminal sanction under state law, and as a condition of probation under federal law (*i.e.*, the Federal Probation Act). See *id.* at 934-935.[27]

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[27] See also Jacob, *The Concept of Restitution: An Historical Overview*, in *Restitution in Criminal Justice* 45 (J. Hudson & B. Galaway eds. 1977); Barnett, *Restitution: A New Paradigm of Criminal Justice*, in *Assessing the Criminal*, 350-354 & n. 2 (R. Barnett & J. Hagel eds. 1977) (overview of history of restitution); Slavin & Sorin, *supra*, 52 Fordham L. Rev. at 541 n. 194 (reviewing state statutes).

Although focusing primarily on harm to victims rather than to society as a whole, restitution shares the traditional objectives of other criminal sanctions: retribution, rehabilitation, and deterrence. For example, restoring the victim's property serves the legitimate penal purpose of vindicating society's interest in peaceful retribution by providing a means for the offender to "make the victim whole." Restitution is "constructed to fit the crime and to emphasize the wrongfulness of the offense and the defendant's moral responsibility." Note, *supra*, 97 Harv. L. Rev. at 939. The offender "disgorge[s] his ill-gotten gains or pay[s] for the injury he has caused." He is "forced to restore the status quo at his expense, thus the victim exacts his revenge." Note, *The Victim and Witness Protection Act of 1982: Who are the Victims of Which Offenses?*, 20 Val. U.L. Rev. 109, 140 (1985).

Commentators, and this Court, have also recognized the strong rehabilitative potential of restitution. See *Kelly* v. *Robinson*, 479 U.S. 36, 49 n.10, (1986). Like a criminal fine, restitution involves the payment of money, but restitution may be more effective as a tool for rehabilitation. As one commentator has pointed out, "[t]o the offender's pocket it makes no difference whether what he has to pay is a fine, costs or compensation. But to his understanding of the nature of justice it may make a great deal." M. Fry, *Arms of the Law* 124 (1951). Restitution brings the offender face to face with the concrete effects of his wrongful conduct on individual members of society by establishing a relationship between the offender and "the person whom he made his victim." Restitution forces the offender to continue to confront his victim until such time "as the victim's condition has been restored to the fullest extent possible." S. Shafer, *Com-*

pensation and Restitution to Victims of Crime 135 (1970); see also *id.* at 125-126. For this reason, "in many cases, payment to the injured party will have a stronger inner punishment value than the payment of a sum to the neutral state." Shafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 Minn. L. Rev. 243, 249 (1965).

Finally, "[l]ike a fine, restitution can also be an effective deterrent." Indeed, "restitution may be more effective than a fine." Note, *supra*, 97 Harv. L. Rev. at 938. In many instances, especially in white collar or economic crimes, the criminal's gain is usually equal to the victim's loss, while a fine typically represents only some fraction of the benefits of a crime. Restitution, which "more directly corresponds to the loss the offender has caused," also more effectively deprives the offender of his ill-gotten gains. *Id.* at 939. See also *Kelly* v. *Robinson*, 479 U.S. at 49 n.10 ("[T]he more precise relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.").

b. The meaning and scope of the term "order of restitution" in the VWPA is further illuminated by consideration of the state courts' exercise of their authority to administer restitution as a penal sanction. State court authority to impose a penalty of restitution as a condition of probation has existed for even longer than federal authority, and is now universally prescribed by statute.[28] The legislative history of the VWPA makes

[28] Although state courts may possess inherent authority to impose penal restitution, see *Ex parte United States*, 242 U.S. 27, 50 (1916), modern state cases rely upon statutory authority. Some state statutes place express limits of varying kinds on the extent of restitution that may be ordered; others grant broader authority. For examples of the range of statutory provisions, compare N.J. Stat. Ann. § 2C43-3(e) (West Supp. 1989) (providing the sentencing court with the authority to order restitution up to double the "loss to the victim" where "loss" is defined as "the amount of value separated from the victim"); Ill. Ann. Stat. ch. 38, § 1005-5-6

clear that, in structuring the restitution provisions of the VWPA, Congress was aware of the states' conception of the proper scope and purposes of the penal sanction of restitution, and the bounds of their courts' sentencing power.[29]

(a) and (e) (Smith-Hurd Supp. 1989) (limiting restitution to "actual out-of-pocket expenses, losses, damages, or injuries proximately caused by the conduct of all of the defendants"); *with* Cal. Penal Code § 1203.1 (West Supp. 1989) (permitting the court to order "reasonable" restitution that is "fitting and proper to the end that justice may be done, that amends be made to society for the breach of the law, for any injury done to any person resulting from that breach, and * * * for the reformation and rehabilitation of the prisoner"); Mich. Comp. Laws Ann. § 771.3(2)(d) and (4) (West Supp. 1989) (permitting the court to impose restitution "as the circumstances of the case may require or warrant, or as in its judgment may be proper"); Or. Code Ann. § ORS 137.540 (West Supp. 1989) (court may order as condition of probation payment of "restitution * * * on a schedule of payments determined by the court"); Wis. Stat. Ann. § 973.20 (West Supp. 1989) ("in addition to any other penalty authorized by law, the [court] shall order the defendant to make full or partial restitution * * * to any victim of the crime [as a condition of probation] * * * unless the court finds substantial reason not to do so"). See also Slavin & Sorin, *supra*, 52 Fordham L. Rev. at 540 n.194 (review of state statutes); Note, *supra*, 20 Val. U.L. Rev. at 131 & n. 172 (reviewing statutes of states that "have adopted the unlimited approach in regard to victim restitution").

[29] For example, the section-by-section analysis of H.R. 7191, *supra*, included the following quotation from a Wisconsin case, *Huggett* v. *State*, 83 Wis.2d 790, 798, 266 N.W.2d 403, 407 (1978), to describe "the importance of restitution as a criminal sanction," 128 Cong. Rec. 26,352 (1982):

> Restitution can aid an offender's rehabilitation by strengthening the individual's sense of responsibility. [The offender] may learn to consider more carefully the consequences of his or her actions. One who successfully makes restitution should have a positive sense of having earned a fresh start and will have tangible evidence of his or her capacity to alter old behavior patterns and lead a law-abiding life.

See also 128 Cong. Rec. 26,348 (1982) (statement of Rep. Rodino quoting the same opinion of the Wisconsin Supreme Court). It is

An examination of state jurisprudence reveals that, except to the extent authority to order penal restitution is specifically limited by statute, the courts have generally assumed an expansive authority to shape restitution orders by considering conduct of the defendant beyond the narrow confines of the actual offense of conviction.[30]

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notable that, under Wisconsin law, restitution may be ordered for "all property or monetary losses caused by the criminal acts of the defendant which have been brought to the court's attention, although the defendant has been convicted or pleaded guilty only to one of them. In such situations, when the amount of the loss is determined on the face of the record or by defendant's admission, no problem arises as to the amount of restitution which can be made a condition of probation." *State* v. *Gerard*, 57 Wis. 2d 611, 619, 205 N.W.2d 374, 378-379 (1973). See also *Garski* v. *State*, 75 Wis. 2d 62, 72-73, 248 N.W.2d 425, 430-431 (1977) (upholding complete order of restitution encompassing charges dismissed under plea agreement as "consistent with the desire to induce financial responsibility as a means of assisting the defendant to lead a law-abiding life").

[30] See, for example, *People* v. *Gallagher*, 55 Mich. App. 613, 223 N.W. 2d 92, leave denied, 393 Mich. 766 (1974) (restitution for value of entire stolen car from defendant convicted of theft of car part); *People* v. *Dawes*, 132 Ill. App. 2d 435, 436, 270 N.E.2d 214, 215 (1971), aff'd, 52 Ill. 2d 121, 284 N.E.2d 629 (1972) (restitution for losses caused by defendant's fraudulent scheme "not only to original complainants but also to those subsequently discovered"); *People* v. *Miller*, 256 Cal. App. 2d 348, 64 Cal. Rptr. 20 (1967) (restitution to various individuals in connection with fraudulent practices of construction firm in excess of amount involved in one count of grand theft); see also *State* v. *Gerard*, *supra*; *People* v. *Lippner*, 219 Cal. 395, 397, 26 P.2d 457, 458 (1933); but cf. *State* v. *Barnett*, 110 Vt. 221, 231-232, 3 A.2d 521, 525 (1939) (in absence of any statutory provision authorizing or restricting restitution, court decided that "restitution conditions in probation cases * * * must be for loss sustained as a direct consequence of the particular crime of which the respondent stands convicted").

So strong is the assumption of broad sentencing authority that the Court of Appeals of Oregon has construed a statute with fairly restrictive language as consistent with broad judicial authority to order restitution beyond the count of conviction. *e.g.*, *State* v. *Foltz*, 14 Or. App. 582, 584-585, 513 P.2d 1208, 1209-1210 (Ct. App. 1973) (order of restitution to welfare department for $2600 il-

Once conferred, the court's authority is inherently limited only by general standards of reasonableness governing consideration of extra-statutory factors that have always been understood appropriately to bear on sentencing, and by the requirement that the restitution order advance recognized penological goals. Although rarely characterizing their rulings directly in terms of penological objectives, state courts have acknowledged that their residual authority to go beyond the conduct underlying the offense of conviction, even under a liberal statute, is not unbounded. See, *e.g.*, *People* v. *Williams*, 247 Cal. App. 2d 394, 55 Cal. Rptr. 550, 560 (Ct. App. 1966) (restitution for assault against store owner who confiscated an overdrawn credit card issued to the defendant could not extend to repayment to the credit card issuer of the amount of defendant's unpaid debt).[31] In upholding an extensive restitution order, after concluding that a "defendant's rehabilitation could best be achieved in a context of complete reparation for the harm done his former customers," one California court stated:

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legally received, as condition of probation on conviction for theft of $120 in welfare payments, not an abuse of discretion notwithstanding that the statute authorized an order of "restitution to the aggrieved party for the damages or loss caused by the offense, in an amount to be determined by the court"). The language of the Oregon statute has since been revised to reflect the more expansive approach. See note 28, *supra*.

[31] In the same vein, the federal courts have recognized limits on the discretion of sentencing courts to order restitution where losses are judged too tenuously related to the defendant's offensive conduct, or as not coming within the appropriate scope of restitutionary liability. See, *e.g.*, *United States* v. *Kenney*, 789 F.2d 783 (9th Cir.) (restitution under the VWPA for bank robbery could not extend to salaries the bank paid its employees to testify at trial), cert. denied, 479 U.S. 990 (1986); *United States* v. *Barany*, 884 F.2d 1255, 1261 (9th Cir.) (restitution under VWPA for mail fraud perpetrated against insurance company could not extend to the company's legal fees in defending a tangentially related civil case), cert. denied, 110 S. Ct. 755 (1989); *United States* v. *Pollak*, 844 F.2d 145 (3d Cir. 1988) (no restitution for legal fees).

> Our conclusion should not be interpreted as authorizing the trial court or the probation office to range far afield in search of all possible losses caused by the defendant and require him to wipe his financial slate completely clean as a condition of his probation. Such a policy would reduce the courts to mere collection agencies. But we do agree with what seems to be the principle established by the California cases, that the probation office in fixing restitution should not be limited by the formalities of the criminal proceeding. Probation is granted in hope of rehabilitating the defendant and must be conditioned on the realities of the situation, without all of the technical limitations determining the scope of the offense of which defendant was convicted. In determining where to draw the line between what is a reasonable and what is an unreasonable condition, common sense and reason must limit the court's discretion. This discretion must not be disturbed unless there has been a manifest abuse.

People v. *Miller*, 256 Cal. App. 2d 348, 356, 64 Cal. Rptr. 20, 25 (1967).

2. This flexible approach to fixing the level of restitution is fully in keeping with the courts' customary discretion to consider a wide variety of factors in passing on the more conventional aspects of a sentence. See, *e.g.*, *United States* v. *Grayson*, 438 U.S. 41, 47-55 (1978) (sentencing judge's authority to calibrate sentence based on a "largely unlimited" range of information; judge could consider evidence that defendant testified falsely at trial, notwithstanding absence of charge or conviction for perjury); *Profitt* v. *Florida*, 428 U.S. 242, 255-258 (1976) (aggravating and mitigating factors considered by judge in imposing death penalty); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85-86 (1986) (upholding state statute that treats "visible possession of a firearm" during the commission of an offense, if found by the judge by a preponderance of the evidence, as a "sentencing factor" for application of a mandatory minimum).

In the new Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. II, 98 Stat. 1987; see 28 U.S.C. 991(b)

(Supp. IV 1986) and 994(k); 18 U.S.C. 3553(a)(2) (Supp. II 1984), Congress has shifted the emphasis in federal sentencing policy away from rehabilitation to punishment, education, and deterrence. See *Mistretta* v. *United States*, 109 S. Ct. 647, 651 (1989). But it has preserved the authority of courts to look beyond the statutory elements of the offense of conviction in imposing sentence. See Sentencing Guidelines promulgated by the United States Sentencing Commission (effective November 1, 1989), implementing 28 U.S.C. 994 *et seq.* By mandating consideration of a host of factors, the Sentencing Guidelines incorporate into the process of fixing sentence various "real offense" characteristics of the criminal violation, in addition to the strict elements of the charge. See *United States Sentencing Commission Guidelines Manual* 1.5-1.6 (Nov. 1, 1989) [hereinafter *Sentencing Guidelines*] (discussion of sentencing guidelines as a "modified real offense system"); see also, *e.g.*, *Sentencing Guidelines* § 5E1.2, at 5.18-5.21 (factors in determining amount of criminal fine).

In particular, with regard to the offense of which petitioner was convicted—a violation of 18 U.S.C. 1029 (Supp. II 1984)—the *Sentencing Guidelines* specifically provide for a punishment range that is geared to the *total* amount of the victim's loss caused by parallel instances of "unauthorized use of an access device" by the defendant, where such instances can be separately charged under the applicable provision. The commentary following § 2F1.1 para. 6 of the *Guidelines*, which sets forth rules of sentencing for a category of fraud and deceit offenses (including violations of Section 1029), provides (emphasis added):

> Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. *The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction.*

Moreover, in addressing repetitive or ongoing criminal behavior under § 3D1.2(b), at 3.13, the *Guidelines* direct a grouping together for sentencing purposes of

> Counts involv[ing] the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

3. Congress, in formulating the VWPA, authorized the sentencing court to look beyond the strict statutory elements of an offense to other "appropriate factors"—including the "realities" of the offenders' entire course of conduct towards the victim—in fixing the amount of restitution. Thus, the VWPA works no radical departure from the "real offense" approach to sentencing that the courts have commonly practiced, with this Court's approval, and that Congress recently codified in systematic form in the Sentencing Reform Act of 1984. And there is nothing unique to restitution that would justify a different standard for this penalty, or would warrant restrictions on consideration of additional wrongful conduct of a defendant towards the victim as an "appropriate factor" in sentencing. On the contrary, a reading of the statute as mandating an inflexible disregard of such conduct would seriously undermine the goals of retribution, rehabilitation, and deterrence as well as objectives of fairness and broad compensation that are expressly articulated in the VWPA itself.

a. As discussed above, a preponderance of evidence may convincingly point to a defendant's responsibility for acts that, for reasons unrelated to the ambit of the defendant's activities or the extent of his culpability, are not charged in the indictment, made the basis of a plea bargain, or successfully prosecuted "beyond a reasonable doubt" at trial. Both the defendant and the victim may be well aware that the count of conviction represents only a small fraction of the loss that the victim suffered through the offender's wrongful conduct. Charging only the smaller amount will eviscerate the potential deterrent effect of restitution, which is maximized only if the defendant is made to disgorge the full value of his ill-gotten gains. And the psychological and rehabilitative benefits to a defendant of making the victim whole will be lost if the defendant is ordered to compensate the victim for only a fraction of the actual damage. Finally, an order of restitution that falls short of full compensation to the victim will frustrate the retributive purposes of the punishment, causing the victim to feel that he has not received satisfaction and that justice has not been done. Thus, the VWPA should be construed in a manner that will enable courts to maximize the objectives of restitution to the fullest possible extent. An "offense of conviction" limitation on the amount of restitution disserves this goal.

b. A reading of the courts of appeals decisions applying the VWPA suggests a number of "appropriate factors" (see Section 3580(a)) that may properly enter into the determination whether restitution should include amounts in excess of the loss caused by the specific offense of conviction. Thus, the courts have focused on the concepts of "related acts," *United States* v. *Berrios*, 869 F.2d at 29; on whether there is a "significant connection" between the offense and other acts, see *United States* v. *Duncan*, 870 F.2d 1532, 1536 (10th Cir. 1989); on whether the conduct of conviction is part of a conspiracy, scheme or plan, see *United States* v. *Pomazi*, 851 F.2d 244, 249 (9th Cir. 1988); *United States* v. *Angelica*, 859 F.2d 1390, 1395 (9th Cir. 1988); and, in defining the ambit of the term "victim of the offense," on whether a person suffers as a result of a "continuing" or "uninterrupted series of events surrounding the criminal activity," *United States* v. *Mounts*, 793 F.2d 125, 129 (6th Cir. 1986); *United States* v. *Durham*, 755 F.2d 511, 513 (6th Cir. 1985). See also Pet. Br. 31-33 & n.18-20 (citing cases under the VWPA). And under both the VWPA and FPA, courts have placed significant emphasis on whether the defendant has agreed to make restitution in excess of

the conduct of conviction as part of his plea bargain, *United States* v. *Kirkland*, 853 F.2d 1243, 1251 (5th Cir. 1988), or has admitted to responsibility for the greater loss. See, *e.g.*, *United States* v. *Berrios*, 869 F.2d at 32, 33; *United States* v. *Spambanato*, 876 F.2d 5, 7 (2d Cir. 1989); *United States* v. *Paul*, 783 F.2d 84, 86-88 (7th Cir. 1986). See also cases cited pp. 24-25 & n.21, *supra*.

The intuition that the presence of such factors often makes a broader restitution order more appropriate is fundamentally sound. An amount of restitution that fails to compensate for closely related wrongful conduct is manifestly less fair to the victim, and more likely to undermine goals of deterrence, rehabilitation, and retribution, than is an order that leaves uncompensated losses that are only remotely related to the conduct underlying the conviction. And when the defendant has acknowledged culpability for losses in excess of the conduct of conviction, the unfairness of ignoring such losses may seem greater than if the injury is proved by extraneous evidence, since, in the former case, the offender's responsibility for the loss is not in doubt.[32] The statute makes room for these considerations, not as hard and fast criteria, but as "appropriate factors," see Section 3580(a), that may shape a restitution order.[33] And like other decisions with regard to sentencing, the

[32] The *Sentencing Guidelines* recognize that this factor appropriately bears on sentencing. See § 3E1.1, at 3.23-3.24.

[33] There are other criminal contexts in which the courts are called upon to make decisions based on the degree of relationship between acts or offenses, or whether they are part of a common scheme or plan. Cf. Fed. R. Crim. P. 8(a) (Joinder of Offenses) (offenses may be charged in the same indictment if they are "of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan"); Fed. R. Evid. 404(b) (evidence of "other crimes, wrongs, or acts" are not admissible to show action "in conformity therewith," but only as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").

judge's decision to take into account conduct other than that underlying the offense of conviction, if otherwise within statutory bounds, should be reviewed only for abuse of discretion. *Cf. United States* v. *Youpee*, 836 F.2d 1181, 1182 (9th Cir. 1988).

In this case, it was entirely appropriate for the court to look beyond the offense of conviction, and beyond the petitioner's suggested limit to the losses caused by use of the Godfrey credit card, to the petitioner's entire course of conduct that resulted in injury to MBank. The fact that petitioner refused to admit to responsibility for losses flowing from the unauthorized use of credit cards other than the Godfrey card does not in itself defeat the restitution order under the VWPA. It was sufficient that the government showed by a preponderance of the evidence that petitioner had in fact removed the cards from the post office box and that his actions resulted in their unauthorized use. Given the close relation between this conduct and the offense of conviction, and the existence of a common victim and a common scheme, the court did not abuse its discretion in deciding that the goals of the restitution provisions were best served by a more inclusive order.

II. A SENTENCE OF RESTITUTION FOR LOSSES CAUSED BY ACTS OTHER THAN THE OFFENSE OF CONVICTION DOES NOT VIOLATE THE CONSTITUTION

Section 2(b)(2) of the VWPA directs the courts to protect victims to the fullest extent possible "without infringing on the constitutional rights of the defendant." Congress surely intended to authorize restitution orders in an amount based on conduct other than the offenses of conviction, since such penalties do not violate any constitutional rights. Petitioner argues (Br. 27-31) that the interpretation of the VWPA applied by the courts below infringed his Sixth and Seventh Amendment rights to trial by jury and his Fifth Amendment right to due process. The courts of appeals have rejected constitu-

tional challenges to the VWPA, see, *e.g.*, *United States* v. *Palma*, 760 F.2d 475 (3d Cir. 1985); *United States* v. *Keith*, 754 F.2d 1388 (9th Cir.), cert. denied, 474 U.S. 829 (1985); *United States* v. *Watchman*, 749 F.2d 616 (10th Cir. 1984); *United States* v. *Brown*, 744 F.2d 905 (2d Cir.), cert. denied, 469 U.S 1089 (1984); *United States* v. *Florence*, 741 F.2d 1066 (8th Cir. 1984); but see *United States* v. *Durham*, 755 F.2d at 514 (declining to address the issue), and their reasoning is fully applicable in this case.

1. Petitioner has no Seventh Amendment right to a jury trial on the issue of restitution because that right extends only to civil cases. The characterization of a penalty as civil or criminal is a question of legislative intent, *United States* v. *Ward*, 448 U.S. 242, 248 (1980). Here, the character of restitution as a criminal rather than a civil sanction is evident from the language, structure, and legislative history of the VWPA. The statute permits restitution to be ordered "in addition to or in lieu of any other penalty authorized by law," Section 3579(a)(1), and the "penalty" of restitution is imposed when sentencing a defendant convicted of an enumerated criminal offense. *Ibid.* If restitution is ordered as a condition of probation or parole, revocation (followed by incarceration) may result from the defendant's failure to adhere to the order. Section 3579(g). Also, the "victim of the offense," while the beneficiary of the restitution order, does not initiate, directly participate in, or otherwise control the course of the restitution proceeding.[34] In sum, no provision of the VWPA supports a

[34] The victim has no control over the government's request for restitution or over the government's production of information in support of the restitution request. There is no provision for the victim to appeal the district court's restitution determinations as inadequate, inappropriate, or illegal. See *United States* v. *Franklin*, 792 F.2d 998 (11th Cir. 1986). The consideration of restitution during sentencing does not supplant the victim's right to bring a civil proceeding, although there are provisos precluding double recovery by the victim. Section 3579(e). The collateral estoppel effect of an order of restitution is limited to the "essential allega-

view that an order of restitution is a civil, rather than a criminal sanction.[35]

2. Petitioner's Fifth and Sixth Amendment arguments are based on the erroneous assumption that an order of restitution compensating for injury caused by particular acts necessarily inflicts a penalty for *those* acts. In acting on its findings, during the sentencing phase, as to the fact and amount of injury to MBank from the theft of credit cards other than the Godfrey card, the

tions" of the offense for which the defendant is being sentenced. Section 3580(e).

[35] An order of restitution may be enforced by the United States or by a victim named in the order to receive the restitution in the same manner as a judgment in a civil action. Section 3579(h). This is no different in conception from the authority of the United States to employ civil remedies to secure the collection of a criminal fine. 18 U.S.C. 3613. The VWPA also specifies that fact-finding respecting the "proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." Section 3580(d). As discussed, p. 45, *infra*, such a standard of proof traditionally has been associated with a court's determination of factual information relevant to the fixing of sentence and has been approved by this Court as consistent with due process requirements for imposition of criminal punishment. See *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986).

This Court in *Kelly* v. *Robinson*, 479 U.S. at 53 n.14, explicitly recognized that restitution orders imposed in the context of state criminal sentencing proceedings were penal, not civil, sanctions, and noted, with apparent approval, the unanimous view of the federal courts that restitution under the VWPA is a criminal penalty. The legislative history of the VWPA supports the characterization of an order of restitution as a penal sanction. The manager and principal sponsor of the House bill, H.R. 7191, 97th Cong., 2d Sess. (1982), stated in Congressional debate that the legislation "makes restitution available as a penalty." 128 Cong. Rec. 26,348 (1982) (statement of Rep. Rodino). The section-by-section analysis of the House bill, prepared by the House Judiciary Committee, states that the bill "authorizes the court to order restitution in lieu of or in addition to any other penalty imposed, and thereby explicitly recognizes the importance of restitution as a criminal sanction," 128 Cong. Rec. 26,352 (1982).

court did not adjudicate petitioner's guilt of any crimes other than the offense to which he pleaded guilty, nor did it punish him for any other conduct. As we have explained, it is common practice for sentencing judges to look beyond the narrow confines of the statutory elements of the offense, and to take into account a host of "facts related to the crime," *McMillan* v. *Pennsylvania*, 477 U.S. 79, 92 (citing *Profitt* v. *Florida*, 428 U.S. 242 (1976). Judges routinely consider evidence of past acts or criminal conduct of a defendant—including activities that are remote in time and unrelated to the crime of conviction, or that have never resulted in a criminal conviction. Cf. *Sentencing Guidelines* § 4A1.1, at 4.1; *id.* § 4A1.3, at 4.9 (guidelines for taking into account prior criminal conduct, including, where appropriate, "prior similar adult criminal conduct not resulting in a criminal conviction").

These sentencing practices have withstood constitutional challenge. In *United States* v. *Grayson*, 438 U.S. 41, 45-55 (1978), the Court upheld, as a rational exercise of judicial discretion, a judge's consideration at sentencing of a defendant's false testimony, for which he had been neither tried nor convicted. "A defendant's truthfulness or mendacity while testifying," the Court observed, is "probative of his * * * prospects for rehabilitation and hence relevant to sentencing." 438 U.S. at 50. Indeed, the *Grayson* Court endorsed the "fundamental sentencing principle," enacted into law by Congress in 18 U.S.C. 3577 as part of the Organized Crime Control Act of 1970 (now codified at 18 U.S.C. 3661), that "no limitation" need be placed on "the information concerning the background, character, and conduct of a person convicted of an offense which a court * * * may receive and consider for the purpose of imposing an appropriate sentence." 438 U.S. at 50.[36]

[36] See also *McMillan* v. *Pennsylvania*, *supra* (potentially criminal conduct for which a defendant has neither been charged nor convicted can constitutionally be considered during the sentencing phase in fixing the magnitude of a sentence); *Williams* v. *New York*, 337 U.S. 241, 246-251 (1949) (Court permitted the sentencing judge to consider the offender's "history of prior antisocial conduct including burglaries for which he had not been duly convicted," *United States* v. *Grayson*, 438 U.S. at 54).

Moreover, once guilt of the offense has been established, there is no Sixth Amendment right to have a jury determine the appropriate penal sanction for that offense. This Court has held that the sentencing function may constitutionally be discharged by the trial judge. See, *e.g.*, *McMillan* v. *Pennsylvania*, 477 U.S. at 93. During the sentencing phase, the defendant is entitled to fundamental due process protections and to a decision that is not based on demonstrably inaccurate information. See *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948); *Gardner* v. *Florida*, 430 U.S. 349, 358 (1976) (plurality opinion); *Mempa* v. *Rhay*, 389 U.S. 128, 134-137 (1967) (right to counsel); *Specht* v. *Patterson*, 386 U.S. 605, 610 (1967) (right to notice, to present evidence, to examine witnesses). The combination of the provisions of Fed. R. Crim. P. 32 and the procedures specified in the VWPA assure that those fundamental protections will be afforded in the imposition of a restitution order, and they were afforded here.[37]

[37] In addition, at the hearing on his plea, petitioner received notice that restitution might be ordered, as required by Fed. R. Crim. P. 11(c)(1) (before accepting a plea of guilty, judge must notify defendant "that a court may * * * order the defendant to make restitution to any victim of the offense"). Although Rule 11(c)(1) requires that the defendant be informed that restitution may be ordered, the judge need not specify the exact amount of restitution before accepting the plea. See Rule 11 advisory committee note to 1985 Amendment ("Because [the VWPA] contemplates that the amount of the restitution to be ordered will be ascertained later in the sentencing process, this amendment to Rule 11(c)(1) merely requires that the defendant be told of the court's power to order restitution. The exact amount or upper limit can-

Indeed, since Rule 32 applies to all aspects of sentencing, a defendant's procedural opportunities to contest the government's factual proffer on the issue of restitution are no less extensive than his opportunities to contest other sentencing determinations made under the procedures of that rule. See Rule 32(c)(3)(A)-(E); VWPA Section 3580(c) and (d).[38]

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not and need not be stated at the time of the plea."); see also *United States* v. *Berrios*, 869 F.2d at 30-31.

The judge told petitioner at his plea hearing that he might be required to "make restitution in the form of money for any property loss suffered by the victim as a result of this offense." J.A. 9. Thus, petitioner received notice that restitution might be part of his sentence, as required by Rule 11(c)(1). To the extent that petitioner might complain that the judge's remark misled him as to the terms of sentence (by implying that the order would only include restitution for a loss *resulting* from the actual offense of conviction), his objection must necessarily be directed at the adequacy of the notice he received under Rule 11, or, on the theory that the judge's remarks constituted a definite "promise" as to his sentence, an objection based on breach of the plea agreement. The judge's remark as to the magnitude of restitution can have no bearing on the judge's statutory power under the VWPA to impose an order of restitution that takes into account harms caused by petitioner's related conduct. In any event, since petitioner has never argued in the course of this litigation that his sentence was imposed in violation of Rule 11, or that the government breached its plea agreement, any such objections are not properly before this Court.

Rule 11 also makes clear that the issue of restitution need not be addressed or resolved at the plea negotiation stage. See Rule 11(e)(1)(A)-(C). Thus, the failure of the parties to the plea agreement to address restitution prior to the plea hearing does not render petitioner's plea invalid under Rule 11.

[38] Petitioner need not have acceded to a stipulation of testimony in this case. He might have called witnesses of his own to undermine the basis of the proposed restitution order; he might even have called the government's witnesses. So long as petitioner's request to rebut the government's showing of the type and amount of appropriate restitution was reasonably justified, the sentencing court would be constrained to grant the request, or to determine that the requested proceedings would "unduly complicate or prolong the sentencing process" under Section 3579(d) and limit the restitution order accordingly.

If petitioner fails to make restitution as ordered, separate due process protections will accompany any consideration of sanctions. Section 3579(g). These will include a consideration whether his failure to make restitution was the result of his indigence (in which event it would be excusable) or was the result of his willful failure to pay despite having acquired some financial resources during the 13 years in which the restitution order remains outstanding.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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STATUTORY APPENDIX

At the time of petitioner's October 1985 offense, Title 18, United States Code, Sections 3579, 3580, and Sections 2, 3, 18 U.S.C. 1512 note and appendix of the Victim and Witness Protection Act of 1982, provided in pertinent part as follows:

§ 3579. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

(e) (1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims

under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f) (1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General for transfer to such victim or person.

(g) If such defendant is placed on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply with such order. In determining whether to revoke probation or parole, the court or Parole Commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's fail-

ure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

§ 3580. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

Section 2, 18 U.S.C. 1512 note (1982):

(a) The Congress finds and declares that:

(1) Without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders.

(2) All too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with the criminal justice system unresponsive to the real needs of such victim.

(3) Although the majority of serious crimes falls under the jurisdiction of State and local law enforcement agencies, the Federal Government, and in particular the Attorney General, has an important leadership role to assume in ensuring that victims of crime, whether at the Federal, State, or local level, are given proper treatment by agencies administering the criminal justice system.

* * * * *

(b) The Congress declares that the purposes of this Act are—

(1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process;

(2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without in-

fringing on the constitutional rights of the defendant; and

(3) to provide a model for legislation for State and local governments.

Section 3, 18 U.S.C. App. at 624 (1982):

Paragraph (2) of rule 32(c) of the Federal Rules of Criminal Procedure is amended to read as follows:

(2) REPORT.—The presentence report shall contain—

(A) any prior criminal record of the defendant;

(B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;

(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and

(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

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